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No. 07-1410

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

NAVAJO NATION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

The Indian Mineral Leasing Act of 1938 (IMLA), 25 U.S.C. 396a *et seq.*, and its implementing regulations authorize Indian Tribes, with the approval of the Secretary of the Interior, to lease tribal lands for mining purposes. In a previous decision in this case, *United States* v. *Navajo Nation*, 537 U.S. 488 (2003) (*Navajo*), this Court held that the Secretary's actions in connection with Indian mineral lease amendments containing increased royalty rates negotiated by the Navajo Nation did not breach a fiduciary duty found in IMLA or other relevant statutes or regulations. The court of appeals held on remand that the Secretary's conduct breached duties linked to sources of law that had been briefed to this Court but not expressly discussed in *Navajo*. The questions presented are:

1. Whether the court of appeals' holding that the United States breached fiduciary duties in connection with the Navajo coal lease amendments is foreclosed by *Navajo*.

2. If *Navajo* did not foreclose the question, whether the court of appeals properly held that the United States is liable as a matter of law to the Navajo Nation for up to $600 million for the Secretary's actions in connection with his approval of amendments to an Indian mineral lease based on several statutes that do not address royalty rates in tribal leases and common-law principles not embodied in a governing statute or regulation.

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1a-43a, 72a-87a, 88a-117a) are reported at 501 F.3d 1327, 347 F.3d 1327, and 263 F.3d 1325. The opinions of the Court of Federal Claims (Pet. App. 44a-69a, 118a-166a) are reported at 68 Fed. Cl. 805 and 46 Fed. Cl. 217.

JURISDICTION

The judgment of the court of appeals was entered on September 13, 2007. A petition for rehearing was denied on January 14, 2008 (Pet. App. 70a-71a). On April 9, 2008, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including May 13, 2008, and the petition was filed on that date. The petition was granted on October 1, 2008. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent provisions are set out in the appendix to the petition for a writ of certiorari (Pet. App. 167a-175a).

STATEMENT

This case concerns the potential liability of the United States for up to $600 million in damages for an alleged breach of trust in connection with the approval by the Secretary of the Interior (Secretary) of mineral lease amendments containing new royalty rates agreed to by the Navajo Nation (Tribe) and a private lessee. This Court previously reversed the Federal Circuit's decision finding the United States liable in this very case, holding that the Acts of Congress addressing mineral leasing imposed no specific fiduciary or other duties enforceable in a suit for money damages. *United States* v. *Navajo Nation*, 537 U.S. 488 (2003) (*Navajo*). The Federal Circuit has now reinstated its prior finding of liability for the same conduct based on several statutes having nothing to do with royalty rates for mineral leases and common-law trust principles not embodied in any statute or regulation. That decision is directly at odds with the Court's previous decision in this case and the established principles on which that decision is based, and it should be reversed by this Court.[1]

1. a. The United States, through the Secretary, regulates the leasing of mineral resources on Indian lands

[1] Because this Court discussed the factual background in detail in *Navajo*, the statement in this brief relies largely on that discussion. To facilitate the Court's present review, Volumes I and II of Joint Appendix reproduce the Joint Appendix previously filed with this Court in *Navajo*, No. 01-1375, and maintain the pagination reflected in that prior filing.

under the Indian Mineral Leasing Act of 1938 (IMLA), 25 U.S.C. 396a *et seq.*, and regulations issued thereunder. IMLA authorizes Indian Tribes, "with the approval of the Secretary," to lease unallotted tribal lands for mining purposes. 25 U.S.C. 396a. Unlike prior statutes governing mineral leases, which gave the Secretary broad control over leasing, IMLA is "designed to advance tribal independence, empowers Tribes to negotiate mining leases themselves, and, as to coal leasing, assigns primarily an approval role to the Secretary." *Navajo*, 537 U.S. at 494, 508.

b. The Secretary also administers the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. 1201 *et seq.*, which the court of appeals found relevant to this case. 30 U.S.C. 1251(b), 1291(23). SMCRA "establish[es] a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations." 30 U.S.C. 1202(a); cf. 30 U.S.C. 1253-1254. It imposes permitting and other regulatory requirements that set performance standards for ongoing surface coal mining operations and requires plans for post-mining reclamation. See, *e.g.*, 30 U.S.C. 1257-1260, 1265.

Subsections (c) and (d) of SMCRA's Indian lands provision, 30 U.S.C. 1300, specify that "all surface coal mining operations on Indian lands shall comply with requirements at least as stringent as those imposed" by pertinent provisions of the Act with respect to surface mining generally, and that "the Secretary shall incorporate the requirements of such provisions in all existing and new leases issued for coal on Indian lands." 30 U.S.C. 1300(c) and (d); cf. 30 U.S.C. 1273(a), 1291(9). The Act also provides that the Secretary shall, for "leases issued after August 3, 1977, * * * include and

enforce terms and conditions in addition to those required by subsections (c) and (d) * * * as may be requested by the Indian tribe in such leases." 30 U.S.C. 1300(e). An implementing regulation issued by the Secretary provides for inclusion of lease terms "related to" SMCRA that are requested by the lessor tribe. 25 C.F.R. 200.11(b).

The Office of Surface Mining Reclamation and Enforcement (OSM) has regulatory authority under SMCRA over mining operations on Indian lands, as it does with respect to mining operations generally, and OSM routinely consults with the Bureau of Indian Affairs (BIA) before exercising that authority on Indian lands. See 30 U.S.C. 1211; 30 C.F.R. 750.6(a)(1)-(4). The BIA, in turn, is responsible for consulting directly with affected Tribes and making recommendations to OSM concerning OSM's regulatory actions "relating to surface coal mining and reclamation operations on Indian lands." 30 C.F.R. 750.6(d)(1)-(2).

2. a. The Navajo Nation occupies the largest Indian reservation in the United States. Over the past century, large deposits of coal have been discovered on the Tribe's lands, which are held for it in trust by the United States. *Navajo*, 537 U.S. at 495.

In the Navajo-Hopi Rehabilitation Act of 1950 (Rehabilitation Act), 25 U.S.C. 631 *et seq.*, which the court of appeals also found to be relevant in this case, Congress authorized the Secretary to undertake, "within the limits of the funds * * * appropriated pursuant to [the Act]," a "program of basic improvements for the conservation and development of the resources of the Navajo and Hopi Indians [and] the more productive employment of their manpower." 25 U.S.C. 631. The program included education, road, soil and water conservation, irri-

gation, telecommunications, and business development projects, as well as "[s]urveys and studies of timber, coal, mineral, and other physical and human resources." *Ibid.* Congress initially authorized approximately $89 million for the program, including $500,000 for surveys and studies, 25 U.S.C. 631(3), and directed the Secretary to complete the program, so far as practicable, within a 10-year period. 25 U.S.C. 632; cf. H.R. Rep. No. 2455, 85th Cong., 2d Sess. 4, 7 (1958). After Congress authorized an additional $20 million for essential roads in 1958, *ibid.*; 25 U.S.C. 631(7), road construction ended around 1964, and the Secretary completed the program authorized by the Act at that time. S. Rep. No. 11, 93d Cong., 1st Sess. 1 (1973).

b. Today, the Tribe receives tens of millions of dollars in royalty payments pursuant to mineral leases with private companies. The lease at issue in this case, Lease 8580 (J.A. 188-220), was executed by the Tribe and a predecessor to the Peabody Coal Company (Peabody) and took effect in 1964 upon approval by the Secretary. It provided that "the royalty provisions of this lease are subject to reasonable adjustment by the Secretary * * * or his authorized representative" on the 20-year anniversary of the lease, and every ten years thereafter. *Navajo*, 537 U.S. at 495 (quoting J.A. 194).

As the 20-year anniversary of Lease 8580 approached, its royalty rate of 37.5 cents per ton yielded a royalty of approximately 2% of gross proceeds. Pet. App. 89a. That rate exceeded the minimum rate of 10 cents per ton established by then-applicable IMLA regulations, 25 C.F.R. 211.15(c) (1985), but was substantially below the 12.5% minimum royalty rate established in 1977 for coal mined on federal lands under the Min-

eral Leasing Act, 30 U.S.C. 207(a). *Navajo*, 537 U.S. at 495-496.

c. In March 1984, the Chairman of the Tribe wrote to the Secretary asking him to exercise his authority under Lease 8580 to adjust the royalty rate. J.A. 372-374. In June 1984, the Director of the BIA Navajo Area Office, acting pursuant to authority delegated by the Secretary, issued an opinion letter approving the Tribe's unilateral request to adjust the royalty rate to 20% of gross proceeds. *Navajo*, 537 U.S. at 496. The Area Director reached this determination "in consultation with the [Tribe]," 00-5086 C.A. App. A2283; see *id.* at A2319-A2320; J.A. 8; C.A. App. A2685, and subsequently notified Peabody of the adjustment. J.A. 8-9.

Peabody filed an administrative appeal of the Area Director's decision in July 1984, pursuant to 25 C.F.R. 2.3(a) (1985). *Navajo*, 537 U.S. at 496. That informal appeal process was "largely unconstrained by formal requirements," including any prohibition on *ex parte* communications. *Id*. at 513. The appeal was referred to the Deputy Assistant Secretary for Indian Affairs, John Fritz, acting as both Commissioner of Indian Affairs and Assistant Secretary for Indian Affairs. *Id.* at 496. After 30 days had elapsed from the parties' final pleading deadline without a decision by Fritz, either the Tribe or Peabody would have been entitled under regulations then in effect to have the matter transferred to the Interior Board of Indian Appeals (Board or IBIA) for a more formalized appeal process in which *ex parte* communications would have been prohibited. *Id*. at 496 & n.3, 513 (citing 25 C.F.R. 2.19(b) (1985) and 43 C.F.R. 4.27(b) (1985)). Neither invoked that right, however, and, by June 1985, the parties anticipated that a decision by Fritz favorable to the Tribe was imminent. *Id*. at 496

(citing J.A. 98-99). Such a decision, if issued, would have been subject to further review and modification by the Secretary. *Id.* at 498 n.4, 513-514.

The record developed on remand from this Court's *Navajo* decision in 2003 reveals that the Tribe's prediction of a favorable decision in June 1985 was the product of *ex parte* contact with Interior officials. J.A. 413-414. In May 1985, a staff attorney for the Tribe telephoned the attorney in the Office of the Solicitor of the Interior Department who was assigned to prepare a draft decision letter in Peabody's appeal for Deputy Assistant Secretary Fritz. The Tribe's attorney learned from the Interior Department that Interior's internal legal review of the appeal had been completed and that a technical review would be finished within days, and he concluded from the tone of their conversation "that [the Tribe] will prevail on the legal issues" in Peabody's appeal. J.A. 413; see J.A. 507. The Tribe's attorney explained in a memorandum to the Attorney General of the Tribe that his reading of that conversation was bolstered by the fact that the Tribe's technical expert similarly had "talked with the BIA technical staff" and learned that they had recommended affirmance of the Area Director's decision. J.A. 414. He therefore advised the Tribe's Attorney General that the Tribe "should expect a decision by [mid-]June * * * affirm[ing] the 20% royalty rate of the Area Director" and, based on that expectation, should not submit a response to Peabody in their ongoing negotiations until a decision was issued in the appeal. J.A. 414, 416.

Peabody informed the Secretary by letter dated July 5, 1985, that negotiations with the Tribe had been progressing in May 1985 but that the Tribe unilaterally suspended ongoing negotiations after "[a]pparently" "re-

ceiv[ing] word of an imminent and favorable decision on the appeal." J.A. 99; see C.A. App. A725.[2] Peabody expressed concern that Interior appeared to be "preempting the[] negotiations" and requested that the Secretary assume direct responsibility for the appeal and either postpone a decision "to allow for a voluntary settlement" or rule in Peabody's favor. J.A. 99-100. The Tribe's staff attorney was served with a copy of the Peabody letter. J.A. 100. The staff attorney, who previously had reported to the Tribe's Attorney General about communication he and the Tribe's expert had had with Interior officials, responded in a letter to the Secretary asserting that "Peabody's speculation that 'the Tribe has received word of an imminent and favorable decision on the appeal' is groundless" and "without any factual basis," because Peabody failed to "disclose[]" the basis for its views. J.A. 420-421. He accordingly requested, on behalf of the Tribe, a final decision by the Department as soon as possible. J.A. 422; see also J.A. 119-121. Peabody representatives then met privately with then-Secretary Donald Hodel in July 1985. No representative of the Tribe was either present at or received notice of that meeting. *Navajo*, 537 U.S. at 497.

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[2] The Interior Department's Associate Solicitor had advised Deputy Assistant Secretary Fritz early in Peabody's appeal that any decision on the appeal with which any party disagreed would "surely be challenged in court" because the decision was of "vital importance" to both the Tribe and the companies involved. 00-5086 C.A. App. A460 (memorandum dated Sept. 13, 1984). Reflecting that understanding, Fritz had repeatedly advised the parties of the Interior Department's preference for a negotiated settlement of their dispute, see, *e.g.*, J.A. 396, 401 (letters dated Nov. 8, 1984 and Dec. 20, 1984), and the Chairman of the Navajo Tribal Council had assured the Secretary in a "confidential" communication dated November 27, 1984 that the Tribe "intend[ed] to pursue further negotiations" during Peabody's appeal. J.A. 397-398.

On July 17, 1985, Secretary Hodel sent a memorandum to Deputy Assistant Secretary Fritz "'suggest[ing]' that Fritz 'inform the involved parties that a decision on th[e] appeal is not imminent and urge them to continue with efforts to resolve this matter in a mutually agreeable fashion.'" *Navajo*, 537 U.S. at 497 (quoting J.A. 117). "'Any royalty adjustment which is imposed on those parties without their concurrence,' the memorandum stated, 'will almost certainly be the subject of protracted and costly appeals,' and 'could well impair the future of the contractual relationship' between the parties." *Ibid*. (quoting J.A. 117). The parties were informed by letter dated August 29, 1985, that a decision in the appeal was still under consideration and had "not yet been finalized." J.A. 125.

Meanwhile, the Tribe had resumed negotiations with Peabody in August 1985. *Navajo*, 537 U.S. at 498; see J.A. 432. The Tribe has asserted that it was not told of the Secretary's memorandum, but it did learn that "someone from Washington" urged a return to negotiations. *Navajo*, 537 U.S. at 498. The record since developed on remand from *Navajo* clarifies that, in 1985, the Chairman of the Tribal Council met personally with Deputy Assistant Secretary Fritz, who "explicitly" told the Chairman that "he would not decide Peabody's appeal until the Navajo Tribe made a final attempt to negotiate with Peabody to avoid further litigation." J.A. 452. Minutes of a joint meeting of committees of the Tribal Council in July 1986 also confirm that the Tribal Council knew that "the Secretary had asked Peabody and the Navajo Nation to sit down and try to work out their differences" and had "indicated an unwillingness

to act on [Peabody's appeal] until [they] have given it one last shot." J.A. 465.[3]

Those negotiations had led to a tentative agreement on September 23, 1985, on a package of amendments that, among other things, increased the royalty rate for Lease 8580 from approximately 2% to 12.5%, the then-standard royalty rate for federal-coal leases. *Navajo*, 537 U.S. at 498-499 & n.6; J.A. 444-447 (discussing tentative agreement).[4] The amendments also included many other provisions benefitting the Tribe, including retroactive application of the increased royalty rate; increased coal royalties and authorization for future royalty ad-

[3] Although the Tribal Council was assured that "the Secretary could decide [Peabody's] royalty appeal" if the Tribe elected even then "not to go forward with" a proposed settlement, J.A. 465, the Tribe opted to continue its negotiations with Peabody for another year until the settlement was finalized in August 1987. See J.A. 472-474, 478.

[4] See J.A. 510-511 (standard royalty). The Tribe similarly agreed to amend two coal-mining leases with other lessees in August and September 1985, independently adopting the standard 12.5% surface-coal royalty rate for those leases. See Gov't Fed. Cl. Supp. Br. in Resp. on Remand App. 161-163, 194 (Utah Construction Company); *id.* at 197-199 (Pittsburg & Midway Coal Mining Company); J.A. 541. When the Tribe renegotiated the royalty rate for Lease 8580 in the late 1990s, it again agreed to the same 12.5% rate. J.A. 547-548, 552. That pattern reflects the standard practice in western coal leases on federal, state, and Indian land from at least 1985 through 1996. J.A. 484, 539, 542; see *Navajo*, 537 U.S. at 495 n.1, 499 n.6; compare also, *e.g.*, J.A. 608 (1981 memorandum identifying six leases from 1977 to 1979 involving small tracts with royalties above 12½%, but noting that "all [surface-coal] tracts have been offered at 12½%" after implementation of Interior's then-new leasing program) with *Navajo*, 537 U.S. at 499 n.6 (discussing prior experimental leasing program and one of the six leases), J.A. 542-544 (explaining that some coal leases from the late 1970s had higher rates reflecting, *inter alia*, the market impact of a second oil shock), and J.A. 518, 542-543 & n.7 (explaining that small tracts that obstruct access can obtain higher royalty rates).

justments on a separate lease (Lease 9910) that did not permit any royalty-rate adjustments by the Secretary; a substantial increase in the Tribe's charges for water; and payment to the Tribe of cash bonuses and tribal taxes. *Navajo*, 537 U.S. at 498-500 & nn.5, 7; J.A. 345-350, 444-447; see J.A. 442-443.

The Tribe, however, apparently was unwilling to finalize the tentative agreement because the agreement's value to the Tribe depended in part upon action by the Hopi Tribe, which owned an undivided one-half interest in the surface coal subject to Lease 9910. J.A. 444-445; see J.A. 277 (noting that Hopi Lease 5743 (J.A. 246-275) was amended to authorize mining of surface coal covered by Lease 9910 (J.A. 221-245)); C.A. App. A490-A491.[5] The Tribe and Peabody thus held their negotiations open pending related negotiations with the Hopi Tribe. J.A. 445. After the three-way discussions successfully concluded in the summer of 1987, J.A. 478, the Navajo Tribal Council approved the negotiated amendments to Lease 8580 in August 1987 based on the determination that they were in "the best interest of the [Tribe]." J.A. 472-474. The parties signed a final agreement in November 1987, J.A. 276, 309, and the Secretary approved the amendments on December 14, 1987, J.A. 337-339. See *Navajo*, 537 U.S. at 500. Pursuant to the parties'

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[5] The Tribe in late 1985 considered invoking its option under Interior's regulations to have Peabody's appeal transferred to the Interior Board of Indian Appeals for a more formal appeal process if Deputy Assistant Secretary Fritz failed to issue a decision within 30 days. J.A. 453 (citing 25 C.F.R. 2.19 (1985), and noting option of a lawsuit "to enforce the time limits"); see J.A. 488. The Tribe, however, "did not elect to transfer the matter to the Board" and, instead, pursued negotiations through August 1987. See *Navajo*, 537 U.S. at 513; *id.* at 496-497 n.3 (discussing regulatory options); J.A. 472-474, 478.

stipulation, the Area Director's decision was vacated, terminating Peabody's administrative appeal. *Ibid.*

3. a. In 1993, the Tribe sued the United States in the Court of Federal Claims for $600 million in damages under the Indian Tucker Act, 28 U.S.C. 1505, alleging that the Secretary's "approval of the [lease] amendments" agreed to by the Tribe and Peabody constituted a breach of trust. J.A. 495, 503-504. The court granted the government's motion for summary judgment. Pet. App. 118a-166a. It concluded that the United States owed general fiduciary duties to the Tribe, and that the Secretary had violated common-law duties of care, loyalty, and candor by meeting secretly with Peabody representatives and acting in its best interests rather than the Tribe's. *Id.* at 135a-136a; *Navajo*, 537 U.S. at 501. But the court concluded that the Tribe failed to state a damages claim under the Indian Tucker Act because it failed to link any breach of common-law duties to a specific statutory or regulatory obligation that could be fairly interpreted as mandating compensation for the government's actions under this Court's decisions in *United States* v. *Mitchell*, 445 U.S. 535 (1980) (*Mitchell I*), and 463 U.S. 206 (1983) (*Mitchell II*). Pet. App. 140a-155a.

b. The Federal Circuit reversed. Pet. App. 88a-117a. It held that, under *Mitchell I* and *Mitchell II*, the United States is liable in damages for a breach of fiduciary duties with respect to Indian resources on land that the United States holds in trust if the government "controls" the resources under the law, because such a "level of control" "giv[es] rise to a full fiduciary duty." *Id.* at 91a-92a. Finding "pervasive control by the United States of the manner in which mineral leases are sought, negotiated, conditioned, and paid" under IMLA and its

regulations, *id.* at 96a-97a, the Court held that the Tribe stated a claim for damages for breach of "common law fiduciary duties" of care, loyalty, and candor, and a statutory duty to "obtain for the Indians the maximum return for their minerals." *Id.* at 98a-100a.

c. This Court granted the government's certiorari petition. The Tribe's merits brief in this Court defended the Federal Circuit's theory of liability stemming from "control," arguing that the Federal Circuit correctly held that the United States had (and breached) fiduciary "trust duties" because, just as in *Mitchell II*, the government holds the Tribe's lands in trust and "exercises comprehensive control and supervision over virtually every stage of [coal] resource development" under a network of statutes and regulations, including IMLA, SMCRA, the Rehabilitation Act, the Indian Mineral Development Act of 1982 (IMDA), 25 U.S.C. 2101 *et seq.*, and 25 U.S.C. 399. See 01-1375 Resp. Br. 1, 14-15, 23, 27, 30, 43; see *id.* at 20-38. In light of that network of provisions, the Tribe argued that the Secretary had "a duty to control and supervise Navajo coal leasing for the Navajo Nation's benefit." *Id.* at 15.

This Court reversed, concluding that it had "no warrant from any relevant statute or regulation to conclude that [the Secretary's] conduct implicated a duty enforceable in an action for damages under the Indian Tucker Act." *Navajo*, 537 U.S. at 514. The Court explained that its decisions in *Mitchell I* and *Mitchell II* "control this case," and that, despite the "endeavor to align this case with *Mitchell II* rather than *Mitchell I*," the "controversy here falls within *Mitchell I*'s domain." *Id.* at 493, 507.

The *Mitchell* cases, the Court explained, reflect a two-step process for determining whether a damages

claim is cognizable under the Indian Tucker Act: First, as a threshold matter, a plaintiff must both identify a "substantive source of law that establishes specific fiduciary or other duties" and "allege that the Government has failed faithfully to perform those duties." *Navajo*, 537 U.S. at 506. That threshold "analysis must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions." *Ibid.* Second, "[i]f that threshold is passed," the rights conferred by those provisions are enforceable in a suit for damages only if "the relevant source of substantive law 'can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties the governing law imposes.'" *Ibid.* (brackets and citation omitted).

While *Mitchell II* held that a damages action was available under the Indian Tucker Act based on specific "statutes and regulations, which clearly require[d] that the Secretary manage Indian resources so as to generate proceeds for the Indians," *Navajo*, 537 U.S. at 505-506, the Court found this case aligned with *Mitchell I* because, while IMLA governed coal leasing on Indian lands, neither IMLA nor its regulations gave "the Federal Government full responsibility to manage Indian resources . . . for the benefit of the Indians." *Id.* at 507 (quoting *Mitchell II*, 463 U.S. at 224). Indeed, the Court concluded, to impose fiduciary duties on the Secretary regarding coal leasing would be "out of line" with one of IMLA's principal purposes—to "enhance tribal self-determination by giving Tribes, not the Government, the lead role in negotiating mining leases with third parties"—because the "ideal of Indian self-determination is directly at odds with Secretarial control over leasing." *Id.* at 508 (citation omitted). The Court further concluded that the Tribe failed to identify any

"substantive prescriptions" in a "specific statutory or regulatory provision" that the Secretary allegedly violated, either in failing to insist upon a higher royalty rate or in his actions during the administrative appeal. *Id.* at 510-511, 513. The Court thus reversed and remanded for further proceedings consistent with its opinion. *Id.* at 514.

4. On remand, the Federal Circuit construed this Court's decision as limited to only the three statutes specifically discussed by the Court—IMLA, IMDA, and 25 U.S.C. 399—from among the "network" of provisions on which the Tribe had relied. See Pet. App. 72a-87a. While the Tribe conceded that it had argued to this Court that its asserted "'network' of relevant statutes, treaties, and regulations" (including SMCRA and the Rehabilitation Act) gave rise to fiduciary duties enforceable in a damages action, it argued to the Federal Circuit on remand that the question presented for which certiorari was granted "was directed only to IMLA." *Id.* at 78a. The Tribe likewise argued that this Court's decision in this case was analogous to *Mitchell I*, which expressly left open for consideration on remand arguments based on statutes not addressed in its opinion. *Ibid.*; cf. *Mitchell I*, 445 U.S. at 546 n.7. The Federal Circuit agreed and remanded to the Court of Federal Claims. Pet. App. 80a-81a.

5. The Court of Federal Claims again entered summary judgment for the United States. Pet. App. 44a-69a. The court explained that a "statute or regulation must 'impose specific duties regarding the Secretary's adjustment of royalty rates for coal'" for the Tribe to recover damages under the Indian Tucker Act, and the Tribe again failed to "tie specific laws or regulatory provisions to the issue at hand"—"approval of the royalty

rate for the Navajo's coal." *Id.* at 58a-59a, 60a, 69a. The "elements of the [Tribe's] 'network,'" the court concluded, "all concern implementation of coal leasing" and do not involve "the formation of coal leases, much less the establishment of royalty rates." *Id.* at 58a; see *id.* at 59a-67a (surveying network). That conclusion, it explained, followed from this Court's "rationale for aligning the Navajo's claim with *Mitchell I* as opposed to *Mitchell II*," and this Court's conclusion that "[t]he ideal of Indian self-determination [reflected in IMLA] is directly at odds with Secretarial control over leasing." *Id.* at 67a-68a (quoting *Navajo*, 537 U.S. at 508).

6. The Federal Circuit again reversed, Pet. App. 1a-43a, holding that "the Nation is entitled to judgment as a matter of law" for two independent reasons. *Id.* at 36a.

a. The court of appeals first rejected the government's argument that the Tribe must "allege a violation of a specific rights-creating or duty-imposing statute or regulation," because, in its view, the government's violation of "common law trust duties" may form the basis of an Indian Tucker Act claim under *Mitchell II* and *United States* v. *White Mountain Apache Tribe*, 537 U.S. 465 (2003) (*Apache*). Pet. App. 36a-38a. It concluded that such common-law trust duties could be judicially fashioned and enforced here based on what it characterized as the government's "comprehensive control of the [Tribe's] coal" resulting from a "network of statutes and regulations." *Id.* at 26a, 31a. The court first noted that the government held the Tribe's reservation lands in trust and that, because the Tribe's "coal [is] located on that land," it too is held in trust. *Id.* at 26a. The court then discussed three statutes that gave the Secretary responsibility for certain discrete matters

pertaining to the Tribe's coal, noting that the government had (1) "assumed coal resource planning responsibilities" under the Rehabilitation Act, *id.* at 27a; (2) "assumed comprehensive control of coal mining operations" under SMCRA regulations that set environmental standards for third-party operators of tribally owned mines and vested various responsibilities under SMCRA in different components of the Interior Department, *id.* at 27a-29a; and (3) "assumed comprehensive control of the management and collection of royalties from coal mining" under the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA), 30 U.S.C. 1701 *et seq.*, Pet. App. 29a-31a.

The court emphasized that, in its view, "specific control of coal leasing" is not a prerequisite for a breach of trust claim in this case, Pet. App. 31a, even though the asserted breach concerns coal leasing and the royalty rate on the lease amendments the Secretary approved. The court instead found it sufficient that the Secretary exercised control over *other* matters affecting the Tribe's coal in the three areas just discussed. *Id.* at 31a-32a. The court recognized that this Court in *Navajo* had explained that IMLA specifically governed mineral leasing and Lease 8580 and that IMLA "aims to enhance tribal self-determination" in a manner directly at odds with Secretarial control over coal leasing, 537 U.S. at 508. Pet. App. 35a-36a. But the court declined to follow that ruling because, in its view, the Court had addressed the government's duties only under IMLA, IMDA, and 25 U.S.C. 399, and did not specifically discuss the other statutes in the Tribe's "asserted network." Pet. App. 35a-36a. Having found a basis for imposing common-law trust duties on the Secretary with respect to coal leasing based on a theory of "control" exercised under those

other statutes addressing other matters, the court held that the Secretary's actions had breached the common-law "duties of care, candor, and loyalty." *Id.* at 38a.

b. The court of appeals alternatively held that the United States was liable under the Indian Tucker Act for violating three duties (distinct from general common-law trust duties) that it derived from the Tribe's "network of statutes and regulations." Pet. App. 36a, 38a-42a.

First, the court noted that the Rehabilitation Act required that the Secretary keep the Tribe "informed" of "plans pertaining to the program [that was] authorized" by that Act in 1950 (which included surveys and studies of coal resources), 25 U.S.C. 631(3) and 638, and held that the Secretary's actions concerning Lease 8580 violated that obligation. Pet. App. 38a-39a.

Second, the court observed that SMCRA regulations, in allocating responsibilities within the Interior Department, specify that the BIA will "provid[e] representation for Indian mineral owners * * * in matters relating to surface coal mining and reclamation operations" regulated by SMCRA, 30 C.F.R. 750.6(d), and held that the Secretary's actions violated that regulation. Pet. App. 38a-39a.

Third, the court concluded that SMCRA requires the Secretary to "include and enforce terms and conditions" in "leases issued after August 3, 1977" as requested by an Indian Tribe, 30 U.S.C. 1300(e), and that the Secretary violated that obligation by refusing to increase Lease 8580's royalty rate to 20% as the Tribe had requested. Pet. App. 39a-40a. The court acknowledged that SMCRA "focuses on environmental protection, not royalty rates." *Id.* at 41a. But the court concluded that Section 1300(e) and its companion regulation did not

"contain[] any subject matter limitation," and that they applied to the Tribe's request concerning Lease 8580 even though that lease was issued before 1977. *Id.* at 41a-42a.

SUMMARY OF ARGUMENT

The Federal Circuit's decision holding the United States liable as a matter of law for up to $600 million in damages under the Indian Tucker Act directly contravenes this Court's 2003 decision and mandate in this very case and the well-settled principles on which that decision rests. Both *United States* v. *Navajo Nation*, 537 U.S. 488 (2003), and the Court's longstanding interpretation of the Indian Tucker Act's limited waiver of sovereign immunity make clear that the Tribe's claim for money damages fails because the Tribe has not shown a violation of any specific statutory or regulatory provision governing the Secretary's actions challenged in this case.

1. This Court in *Navajo* "h[e]ld that the Tribe's [Indian Tucker Act] claim for compensation from the Federal Government fails." 537 U.S. at 493. That holding should have marked the end of the Tribe's claim in 2003. Indeed, the Tribe's principal argument in its merits brief to this Court was that the Act authorized the Tribe to seek damages for an alleged breach of common-law standards of care generally applicable to trustees (not just breaches of specific statutory and regulatory duties) because, in its view, the government exercised comprehensive "control" and "supervision" over the Tribe's coal resources under a "network" of disparate statutes. This Court rejected that contention, holding that the Tribe must identify "specific rights-creating or duty-imposing statutory or regulatory prescriptions" that establish

"specific" duties that the government has allegedly failed to fulfill. *Id*. at 506. The Court further emphasized that it had "no warrant from *any relevant* statute or regulation to conclude that [the Secretary's] conduct implicated a duty" that might support the Tribe's Indian Tucker Act claim. *Id.* at 514 (emphasis added). *Navajo* thus foreclosed the Federal Circuit's revival of the Tribe's claim based on the very same "network" of statutes and regulations that the Tribe relied upon in this Court—now minus the only three statutes even *arguably* relevant to the economic terms of tribal coal leases. The Court's 2003 decision in this case and accompanying mandate are therefore sufficient to dispose of this case again.

2. a. Even if *Navajo*'s mandate did not in itself foreclose the Federal Circuit's judgment imposing liability, the Federal Circuit's reasoning is flatly inconsistent with this Court's interpretation of the Indian Tucker Act both in *Navajo* and the precedents *Navajo* reaffirmed and applied. The Tucker and Indian Tucker Acts provide a limited waiver of sovereign immunity from damages claims founded upon or arising under an "Act of Congress" or a "regulation of an executive department." 28 U.S.C. 1491; see 28 U.S.C. 1505. *Navajo* thus held that an Indian Tucker Act claim must, as a "threshold" requirement, allege a violation by the government of a "specific rights-creating or duty-imposing statutory or regulatory prescription[]." 537 U.S. at 506. However, because such substantive sources of law only sometimes confer a right to recover damages for their violation, *Navajo* makes clear that an Indian Tucker Act claimant must additionally demonstrate that the pertinent statute or regulation is "fairly interpreted as mandating compensation for damages sustained." *Ibid.* (citation omit-

ted). This Court has held that whether a statute or regulation is "money-mandating" at the *second* stage of the foregoing analysis under the Indian Tucker Act may be informed in certain circumstances by whether the statutory or regulatory duties are sufficiently comparable to that of a trustee's duties at common law. That limited use of common-law trust principles, however, does not define the scope of the government's specific duties at the *first* step of the analysis, which is governed solely by the pertinent statute or regulation.

The Federal Circuit concluded that judicially fashioned common-law duties could properly be superimposed on top of the specific statutory and regulatory provisions applicable to the governmental actions challenged in this case based on the court's conclusion that governmental functions concerning tribal coal in respects *other than* coal leasing (which is governed by IMLA) were sufficiently comprehensive to justify new and additional duties concerning approval of royalty rates in coal leases. Pet. App. 31a-32a. That approach is backwards from the framework established by this Court's precedents and rests on a fundamental misreading of the decisions of this Court. Those decisions have carefully distinguished between (1) the specific duties that have allegedly been violated, which are defined by specific statutory and regulatory provisions, and (2) the use of common-law principles as a means of determining whether the specific statutory or regulatory provisions that establish and define the scope of those duties are in turn also money-mandating and, thus, actionable under the Indian Tucker Act.

b. The Federal Circuit's alternative ground for liability, based on purported duties in the Navajo-Hopi Rehabilitation Act and the Surface Mining Control and

Reclamation Act, is equally untenable. Neither statute imposes any duties relevant to the Secretary's actions in this case.

Although the Rehabilitation Act required that the Tribe be kept informed of plans pertaining to the "program authorized" by the Act, that program ended by 1964—decades before the Secretary's challenged actions—when the appropriated funds authorized for the program were exhausted. Even before the "program" ran its course, it did not encompass mineral leasing determinations, which instead were governed by IMLA. One element of the program under the Rehabilitation Act involved conducting "surveys and studies" of Tribal resources, including coal resources, but such preparatory activity plainly does not encompass the adjustment of substantive terms in mineral leases or the generally applicable procedures governing approval and administrative appeals of such adjustments. Indeed, the only provision in the Rehabilitation Act that concerns the leasing of Tribal land applies only to *non-mineral* leases, and Lease 8580 itself makes clear that it was not and could not have been issued under that provision.

SMCRA is, if anything, even further afield. First, the Secretary's SMCRA regulation identified by the court of appeals (30 C.F.R. 750.6(d)(1)) governs the distribution of functions between OSM and the BIA within the Interior Department and imposes no duties on the Secretary as the head of that Department. Section 750.6, moreover, concerns the government's *regulation* of surface coal mining and reclamation *operations* by coal mining companies to protect the environment. It has no bearing on the economic terms of coal leases agreed to by the Tribe.

Similarly, SMCRA's Indian Lands provision (30 U.S.C 1300(e)) by its own terms applies only to leases issued after 1977 and, accordingly, cannot apply to Lease 8580, which was issued in 1964. Even if Section 1300(e) were applicable to the Tribe's lease with Peabody, the statutory text and context make plain that Section 1300(e) merely permits the Secretary to include terms and conditions in tribal coal leases where those provisions relate to SMCRA and supplement the mandatory SMCRA provisions specified by Congress in Section 1300(c) and (d) to govern environmental protection and reclamation in connection with surface mining operations on Indian lands. But, even if the statute were ambiguous on that point, the Secretary has reasonably construed Section 1300(e) as embodying that restriction in formal regulations that are entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984).

In short, the Federal Circuit has failed to follow this Court's 2003 decision in this case and has again strayed from the well-established principles on which that decision was based. Its judgment must again be reversed, and this case dismissed.

ARGUMENT

I. THIS COURT'S DECISION AND MANDATE IN *NAVAJO* FORECLOSED THE BASES FOR LIABILITY ADOPTED BY THE FEDERAL CIRCUIT

The Federal Circuit has improperly disregarded the controlling decision of this Court in this very case. This Court's 2003 *Navajo* decision held that the Tribe's Indian Tucker Act claim fails, foreclosing the theories of liability advanced by the Tribe and adopted by the Federal Circuit on remand. The Tribe previously argued to this Court that a "network" of statutes and regulations

both gave the Government comprehensive "control" over the Tribe's coal resources and demonstrated that its claim was governed by *Mitchell II* (*United States* v. *Mitchell*, 463 U.S. 206 (1983)), not *Mitchell I* (*United States* v. *Mitchell*, 445 U.S. 535 (1980)). The Court squarely rejected those contentions by deciding the case in the government's favor. The Federal Circuit accordingly erred in subsequently relying on those same statutes and regulations to revive the Tribe's claim and hold the United States liable as a matter of law.

This Court granted certiorari in 2002 to resolve whether the Federal Circuit had "*properly held* that the United States is *liable* * * * for breach of fiduciary duty in connection with the Secretary's actions concerning an Indian mineral lease, *without finding* that the Secretary had violated any specific statutory or regulatory duty established pursuant to the [Indian Mineral Leasing Act of 1938, 25 U.S.C. 396a *et seq.*]." 01-1375 Pet. I (emphases added). The premise for the question presented thus was that the United States could not properly be held liable on the Tribe's Indian Tucker Act claim "without" finding a violation of a "specific statutory or regulatory duty established pursuant to the IMLA." The Court answered that question by concluding that a violation of a "liability-imposing provision of the IMLA"—the only statute addressing the approval of the economic terms of Lease 8580—was necessary to hold the United States liable; and, finding no such violation, the Court "h[e]ld that the Tribe's *claim* for compensation"—not just particular arguments supporting that claim—"fails." *Navajo*, 537 U.S. at 493 (emphasis added). Indeed, the Court's decision emphasized that the Court found "no warrant from *any relevant* statute or regulation to conclude that [the Secretary's] conduct

implicated a duty" that might support the Tribe's claim under the Indian Tucker Act. *Id.* at 514 (emphasis added).[6]

The Federal Circuit's revival of the Tribe's claim on remand not only is inconsistent with the Court's express holding that the Tribe's "claim for compensation * * * fails," *Navajo*, 537 U.S. at 493; it is also inconsistent with the reasoning of this Court. The Tribe's lead argument in its merits brief in *Navajo*—after an introductory discussion of general principles concerning the Indian Tucker Act's waiver of sovereign immunity—was that a network of sundry statutes and regulations govern every aspect of coal mining and bring this case under *Mitchell II*, where the Court found liability, rather than *Mitchell I*. It thus argued that, "when governing statutes and regulations, like those here, impose on the United States 'full responsibility to manage Indian resources and land for the benefit of Indians,'" the government's conduct is governed by "common law trust standards." 01-1375 Resp. Br. 33 (quoting *Mitchell II*, 463 U.S. at 224); see *id.* at 20-29; see also *id.* at 30, 35 (arguing that the government's duties were governed by "familiar trust law standards" and were not limited to "specific statutory and regulatory commands" under IMLA or other statutes).

To support its contention that the government "exercises comprehensive control and supervision over virtu-

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[6] The Tribe asserted only two claims for relief in its amended complaint: an Indian Tucker Act claim based on the Secretary's "approval of the amendments" to Lease 8580 (J.A. 501-504) and a breach-of-contract claim (J.A. 504). Because the Court explained that the Tribe's contract claim was not before it, *Navajo* necessarily "h[e]ld that the Tribe's [Indian Tucker Act] claim for compensation from the Federal Government fails." *Navajo*, 537 U.S. at 493, 501 n.9.

ally every stage of [coal] resource development," 01-1375 Resp. Br. 14-15, the Tribe relied on much more than IMLA's coal-leasing provisions. It asserted, *inter alia*, that the Indian lands section (30 U.S.C. 1300) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201 *et seq.*, and accompanying regulations (30 C.F.R. Pt. 750) gave the government control over "all stages of Indian coal surface mining" assertedly as "trustee of the natural resources of the Indian tribes"; and the Tribe similarly argued that the Navajo-Hopi Rehabilitation Act of 1950, 25 U.S.C. 631 *et seq.*, required the Secretary to act in the best interest of the Tribe (25 U.S.C. 631, 635). See 01-1375 Resp. Br. 23, 27, 30, 43. In fact, the Tribe's merits brief relied on *every* statutory and regulatory scheme later cited by the Federal Circuit on remand to find the United States liable. Compare, *e.g.*, *id.* at 1, 3 (listing network of statutes and regulations), with Pet. App. 16a-17a (listing network relied upon on remand).

This Court, however, carefully considered and squarely rejected the Tribe's contentions. It concluded that despite the Tribe's "endeavor to align this case with *Mitchell II* rather than *Mitchell I*," the "controversy here falls within *Mitchell I*'s domain" because the Secretary had "no obligations resembling the detailed fiduciary responsibilities that *Mitchell II* found adequate to support a claim for money damages." *Navajo*, 537 U.S. at 493, 507. Moreover, the Court agreed with the government that—under the *Mitchell II* framework—duties drawn from common-law trust principles could not form the basis for an Indian Tucker Act claim, holding that the Tribe must identify "*specific* rights-creating or duty-imposing *statutory or regulatory prescriptions*" that establish the "specific fiduciary or other duties"

that the government allegedly has failed to fulfill. *Id.* at 506 (emphasis added).

The Court accordingly discussed the statutes and regulations cited by the Tribe that were even arguably relevant to the Secretary's conduct concerning approval of lease amendments, and it concluded that those provisions did not establish any "specific fiduciary or other dut[y]" that the Secretary might have violated. *Navajo*, 537 U.S. at 506-514. The Court explained that IMLA and its implementing regulations (which specifically govern tribal coal leasing) "do not assign to the Secretary managerial control over coal leasing" and that "imposing fiduciary duties on the Government here would be out of line with one of the statute's principal purposes," namely, "to enhance tribal self-determination by giving Tribes, not the Government, the lead role in negotiating leases with third parties." *Id.* at 508; see *id.* at 506-508, 510-513. The Court expressly noted that the Tribe relied on "discrete statutory and regulatory provisions" beyond IMLA, and it specifically ruled that two such statutes—25 U.S.C. 399 (which "is not part of the IMLA") and the Indian Mineral Development Act of 1982, 25 U.S.C. 2101 *et seq.*, the only statutes in the Tribe's network that address leasing or other disposition of Indian coal—established no duties relevant here. *Navajo*, 537 U.S. at 509.

Of course, *Navajo* did not specifically address by name each and every statute in the Tribe's "network," but that simply reflects the fact that the provisions arguably relevant to the Secretary's actions surrounding his approval of the Tribe's coal-lease royalty terms under IMLA did not include the ones left unmentioned, such as the Rehabilitation Act, SMCRA, and the Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C.

1701 *et seq.*, on which the Federal Circuit (like the Tribe) relied on remand. See pp. 16-17, *supra*. That omission no doubt reflects that those other statutes have nothing to do with approval of royalty terms in coal leasing, but rather, as we explain more fully below, concern such disparate subjects as a development program authorizing (among other things) surveys and studies of Navajo coal resources that ended decades before the events in this case, the Secretary's regulation of operators of surface coal mining for environmental purposes, and the Secretary's role in the management of oil and gas royalties due to Indian tribes under mineral leases. The omission by no means suggests that the Court believed that, where the relevant statutes that actually addressed coal leasing failed to support the Tribe's damages claim, the statutes that had nothing to do with coal leasing could somehow support such a claim.[7]

Had the Court believed that the Tribe might support its Indian Tucker Act claim based on those unrelated statutes notwithstanding the Court's disposition of the case, it presumably would have stated, as did the Court in *Mitchell I*, that the claim remained viable for further consideration on remand under those statutes. Cf.

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[7] As its name suggests, FOGRMA addresses the Secretary's role in the management of oil and gas royalties and does not govern royalty management for solid minerals such as coal. See 30 U.S.C. 1701(a)(4) and (b)(2)-(5), 1702(5)-(9) and (13)-(14). Although the court of appeals correctly noted that the Secretary promulgated regulations in 1986 that extended certain royalty accounting programs to coal leases, Pet. App. 29a, those regulations were issued under the authority of "existing laws regarding solid mineral[]" leasing, not FOGRMA. 51 Fed. Reg. 15,764 (1986); cf. 49 Fed. Reg. 37,342-37,343 (1984) (promulgating 30 C.F.R. 241.20 (1985) under non-FOGRMA mineral leasing authority to govern royalty-management penalties "where FOGRMA penalties * * * do not apply by law, e.g., solid minerals").

Mitchell I, 445 U.S. at 546 & nn.6-7; see *id.* at 537 n.1 (listing statutes relied upon by plaintiffs). Indeed, *Navajo* specifically noted that *Mitchell I* limited its ruling to a single statute and expressly "left open" the possibility that "other sources of law might support the plaintiffs' claims." 537 U.S. at 504 (citing *Mitchell I*, 445 U.S. at 546 & n.7). But *Navajo* followed a very different course: The Court unqualifiedly "h[e]ld that the Tribe's *claim* for compensation from the Federal Government fails," *id.* at 493 (emphasis added), and concluded its opinion by stating that, "[h]owever one might appraise the Secretary's intervention in this case, we have no warrant from *any relevant statute or regulation* to conclude that his conduct implicated a duty enforceable in an action for damages under the Indian Tucker Act." *Id.* at 514 (emphasis added). That determination renders the statutes in the Tribe's network either insufficient to implicate an enforceable duty or wholly irrelevant. Either way, the Court's disposition fully resolved the Tribe's Indian Tucker Act claim based on the statutes in its proffered "network" and common-law trust duties derived from the government's asserted control over the Tribe's coal. The Court's disposition thereby foreclosed renewal of that same claim on remand.

Remarkably, the Federal Circuit nevertheless held that the Tribe could revive its Indian Tucker Act claim by re-raising identical trust arguments based on the same statutes presented to this Court—minus the only three arguably *relevant* statutes that this Court found necessary to address by name. That stark departure from this Court's ruling in this very case should be reversed.

II. THE COURT OF APPEALS' RULING, EVEN IF NOT COMPLETELY FORECLOSED BY *NAVAJO*, IS IN ANY EVENT INCONSISTENT WITH *NAVAJO* AND THE DECISIONS OF THIS COURT REAFFIRMED IN *NAVAJO*

Even if this Court's mandate did not in itself foreclose the Federal Circuit's reinstatement of liability, that court's rationale is flatly inconsistent with this Court's decision in *Navajo* and the precedents on which *Navajo* is based. Under this Court's precedents, a damages claim under the Indian Tucker Act is actionable only if it both (1) alleges a violation of a specific constitutional, statutory, or regulatory provision and (2) that provision also may fairly be interpreted as mandating a remedy in money damages for the violation. The court of appeals erred in concluding that Indian Tucker Act claims may be based on violations of common-law trust principles, divorced from any specific rights-creating or duty-imposing statutory or regulatory provisions.

A. The Indian Tucker Act's Waiver Of Sovereign Immunity Extends Only To Violations Of Specific Constitutional, Statutory, Or Regulatory Proscriptions

"It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." *Navajo*, 537 U.S. at 502 (quoting *Mitchell II*, 463 U.S. at 212). Moreover, a waiver of sovereign immunity must be "unequivocally expressed in statutory text," *Lane* v. *Peña*, 518 U.S. 187, 192 (1996), and, where Congress has waived immunity, the "scope" of that waiver must be "strictly construed * * * in favor of the sovereign," *ibid.*, and "not 'enlarge[d] . . . beyond what the language requires.'" *United States Dep't of Energy* v. *Ohio*, 503 U.S. 607, 615

(1992) (citation omitted); see *Department of the Army* v. *Blue Fox, Inc.*, 525 U.S. 255, 261 (1999).

The Tucker Act waives the United States' immunity from suit by granting the Court of Federal Claims jurisdiction over—

> any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. 1491(a)(1). The Tucker Act's "companion statute," the Indian Tucker Act, "confers a like waiver for Indian tribal claims that 'otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe.'" *United States* v. *White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003) (quoting 28 U.S.C. 1505); see *Navajo*, 537 U.S. at 502-503 & n.10; *Mitchell I*, 445 U.S. at 540 (acts provide "same access" to relief).

While the text of the Tucker and Indian Tucker Acts authorizes damages claims "founded * * * upon" (28 U.S.C. 1491(a)(1)) or "arising under" (28 U.S.C. 1505) the Constitution or a federal statute or regulation, it is well settled that "[n]ot every claim invoking the Constitution, a federal statute, or a regulation is cognizable" under those statutes. *Mitchell II*, 463 U.S. at 216. Instead, "[t]he claim must be one for money damages against the United States, and the claimant must demonstrate that the source of substantive law he relies upon 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.'" *Id.* at 216-217 (quoting *United States* v.

Testan, 424 U.S. 392, 400 (1976) (quoting *Eastport S.S. Corp.* v. *United States*, 372 F.2d 1002, 1009 (Ct. Cl. 1967))); accord *Navajo*, 537 U.S. at 503 (quoting *Mitchell II*, 463 U.S. at 218); *Apache*, 537 U.S. at 472.

A plaintiff asserting a non-contract claim under the Tucker or Indian Tucker Act must therefore satisfy two distinct requirements. First, to fall within the express terms of Congress's waiver of sovereign immunity, a plaintiff must assert a claim of right based on a violation of "the Constitution, or any Act of Congress, or any [federal] regulation." See *Mitchell II*, 463 U.S. at 216 (quoting 28 U.S.C. 1491(a)). As this Court explained in *Navajo*, that "threshold" showing for non-constitutional claims must identify "*specific* rights-creating or duty-imposing *statutory or regulatory prescriptions*" that establish the "specific fiduciary or other duties" that the government allegedly has failed to fulfill. 537 U.S. at 506 (emphasis added).

Second, "[i]f that threshold is passed," the plaintiff must further show that "the relevant source of substantive law" whose violation forms the basis of his claim—a statute or regulation—"can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties the governing law imposes." *Navajo*, 537 U.S. at 506 (brackets and citation omitted); see *Testan*, 424 U.S. at 401-402. That showing is both analytically and doctrinally distinct from the initial burden of demonstrating that the government has, in fact, violated a specific statutory or regulatory provision. It rests on the understanding that not "all [such provisions conferring] substantive rights" mandate the award of money damages from the government "to redress their violation," and that the limited waiver of sovereign immunity in the Tucker and Indian Tucker Acts

extends *only* to claims that the government has violated provisions that themselves require payment of a damages remedy. See *id.* at 400-401 (citing *Eastport S.S. Corp.*, 372 F.2d at 1009); *id.* at 397-398; *Eastport S.S. Corp.*, 372 F.2d at 1007-1009; see also *Navajo*, 537 U.S. at 503, 506; *Mitchell II*, 463 U.S. 216-218; cf. *Apache*, 537 U.S. at 480 (Ginsburg, J., concurring) (explaining that *Navajo* addressed the threshold question of whether a statute or regulation "impose[d] any concrete substantive obligations," whereas the "dispositive question" in *Apache* was whether a statute "mandate[d] compensation" for its violation).

B. Purported Violations Of Common-Law Trust Obligations Are Not Actionable Under The Indian Tucker Act

1. The Federal Circuit fundamentally misapplied the foregoing principles in holding that the Tribe need not "allege a violation of a specific rights-creating or duty-imposing statute or regulation" and may instead base an Indian Tucker Act claim on an alleged violation of standards drawn from the common law of trusts. Pet. App. 36a-37a. Indeed, as we have explained, this Court's decision in this very case reaffirmed that the Indian Tucker Act requires the Tribe, at the "threshold" step, to "identify a substantive source of law that establishes specific fiduciary or other duties" that the government must follow and has breached, and, for that reason, the proper "analysis must train on specific rights-creating or duty-imposing *statutory or regulatory* prescriptions" establishing those specific duties. *Navajo*, 537 U.S. at 506 (emphasis added).

If that threshold is satisfied, general principles borrowed from the common law of trusts can then be relevant at the second step of the analysis in determining

whether the source of positive (statutory or regulatory) law imposing the specific duties may—in addition—fairly be interpreted as mandating monetary relief for its violation. But such common-law principles cannot serve as a substitute—at the *first* step of the analysis—for identifying specific statutory or regulatory rights whose violation forms the predicate for an Indian Tucker Act claim. It is well settled that the Tucker and Indian Tucker Acts themselves do "not create any substantive right enforceable against the United States for money damages," *Mitchell II*, 463 U.S. at 216 (citations omitted); see *Testan*, 424 U.S. at 398, and the text of those Acts plainly does not waive sovereign immunity from claims arising under "common law" principles. Accordingly, in the absence of a claim grounded in a violation of a particular "Act of Congress" or "regulation of an executive department," 28 U.S.C. 1491; see 28 U.S.C. 1505, the Acts' statutory waivers of immunity are inapplicable.

The Federal Circuit based its contrary conclusion on its belief that this Court "rejected [that reading of the Indian Tucker Act] in *Apache*" and that *Apache* demonstrates that "elaborate" governmental control will itself give rise to common-law trust duties whose violation is actionable under the Act. Pet. App. 36a-37a. In so holding, the Federal Circuit misconstrued *Apache*, fundamentally misapplied this Court's *Mitchell* precedents, and ignored the controlling framework in this Court's decision *in this very case*, which was decided on the same day as *Apache*.

While the Federal Circuit concluded that *Apache* "found * * * that common-law duties helped to define the 'contours of the United States' fiduciary responsibilities,'" Pet. App. 37a (quoting *Apache*, 537 U.S. at 474),

the quoted text from *Apache*, when read in context, is to the contrary. *Apache* explained that, in *Mitchell II*, the Court found that "statutes and regulations *specifically* addressing the management of timber on allotted lands raised the fair implication that the *substantive obligations imposed on the United States by those statutes and regulations* were enforceable by damages." *Apache*, 537 U.S. at 473-474 (emphasis added). The Court then continued that because "the *statutes and regulations* [in *Mitchell II*] gave the United States 'full responsibility to manage Indian resources and land for the benefit of the Indians,' we held that *they*"—that is, the specific statutes and regulations, not common-law principles—"define[d] . . . [the] contours of the United States' fiduciary responsibilities." *Id.* at 474 (quoting *Mitchell II*, 463 U.S. at 224) (emphasis added). Indeed, *Apache* explained that such a "source of law was needed to provide focus for the trust relationship" in order "[t]o find a specific duty" owed by the government and, only *after* "that focus was provided," should "general trust law [be] considered in drawing the inference that Congress intended damages to remedy a breach of [that] obligation." *Id.* at 477.

The Court in *Apache* applied those principles in confronting a unique, single-sentence statute specifying that the former Fort Apache Military Reservation be "held by the United States in trust for the White Mountain Apache Tribe, subject to the right of the Secretary of the Interior to use any part of the land and improvements for administrative or school purposes." *Apache*, 537 U.S. at 469 (quoting Act of Mar. 18, 1960 (1960 Act), Pub. L. No. 86-392, 74 Stat. 8). That statutory text "expressly and without qualification" employed the term "trust" as "a term of art" that is "commonly understood

to entail certain fiduciary obligations"—and it did so in conjunction with express authorization for the government to occupy and exclusively use the premises for its *own* (not the tribe's) purposes. *Id.* at 480 (Ginsburg, J., concurring). That express statutory "authority to make direct use of portions of the trust corpus" and the Court's apparent conclusion—as a matter of statutory construction—that the statute's use of the term "trust" embodied the principle that "a fiduciary actually administering trust property may not allow it to fall into ruin on his watch," established, the Court held, a statutory obligation to preserve the trust corpus that the government exclusively used for its own purposes. See *id.* at 475; see also *id.* at 479-480 (Ginsburg, J., concurring) ("threshold" requirement of "a substantive source of law that establishes specific fiduciary or other duties" is satisfied by the text of the 1960 Act, which imposed "caretaker obligations" accompanying the government's "daily occupation" and "direct use of portions of the trust corpus") (quoting *Navajo*, 537 U.S. at 506). The government's duty in *Apache* thus derived directly from the *statute* itself, not from general principles of common law.

Apache did not expressly alter the governing analysis set forth in *Navajo* or state that generalized notions of "control" give rise to actionable duties derived from the common law of trusts, and there is no basis for reading *Apache* to have done so *sub silencio*. Both *Navajo* and *Apache* were decided on the same day, and Justice Ginsburg, who authored *Navajo*, joined *Apache*—a 5-4 decision—based on her express understanding that *Apache* "is not inconsistent" with *Navajo* under the reading articulated above. *Apache*, 537 U.S. at 479-480 (concurring opinion). Similarly, Justice Breyer, who joined the

opinion in *Navajo*, also joined Justice Ginsburg's concurrence in *Apache* explaining how *Apache* could be reconciled with *Navajo*. And Justice Souter, who authored *Apache*, indicated in his *Navajo* dissent that while a "right to damages can be inferred from general trust principles" at the second stage of the pertinent analysis, that inquiry occurs "*once* a statutory or regulatory provision is found to create a specific fiduciary obligation" at step one. *Navajo*, 537 U.S. at 514 (Souter, J., dissenting) (emphasis added).

That understanding of the Indian Tucker Act is reinforced by *Mitchell II*, which formed the doctrinal foundation for both *Navajo* and *Apache* and was careful to ground the duties at issue in that case in specific statutory and regulatory prescriptions. Applying the two-step analysis subsequently reaffirmed by *Navajo*, 537 U.S. at 506, the Court in *Mitchell II* carefully partitioned its opinion into discrete sections separating the two inquiries and limited the use of common-law-trust principles to the Court's money-mandating analysis at step two. See *Mitchell II*, 463 U.S. at 219 (explaining organization of Part III of opinion); *id.* at 219-228 (Part III.A and III.B). Thus, the Court in Part III.A of its opinion (463 U.S. at 219-223) turned first to examine the "Acts of Congress and executive department regulations" on which the plaintiffs "based their money claims." *Id.* at 219 (describing Part III.A). While those claims were described in the aggregate as "alleged breaches of trust in connection with [the government's] management of forest resources on allotted [Indian] lands," *id.* at 207, each of the violations alleged by the plaintiffs tracked specific provisions in statutes and regulations governing federal Indian timber management. See *id.* at 210 (describing claims); *id.* at 209, 211,

219-223 & nn.23-28 (discussing governmental duties under statutes and regulations on which the damages claims were predicated).[8] Consequently, the Court's discussion of those duties in *Mitchell II* focused on the obligations imposed by the particular statutes and regulations at issue and nowhere invoked common-law trust principles to define the applicable duties. See *id.* at 219-223. See also *Navajo*, 537 U.S. at 505-506.

Mitchell II's discussion of trust principles was instead limited to Part III.B of the opinion (463 U.S. at 224-228), which addressed—at step two of the analysis—whether the relevant statutes and regulations could in turn "fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties they impose." *Id.* at 219 (describing Part III.B). Because a trustee normally is "accountable in damages for breaches of trust," *id.* at 226, the Court concluded that statutes and regulations that give the government "full responsibility" and identified "fiduciary obligations" for the sole "benefit of the Indians" in order to "generate proceeds for the Indians" may "fairly be interpreted as mandating compensation" for a breach of those duties. *Id.* at 224-227. This limited use of trust principles (to infer by analogy a statutory and regulatory intent to mandate a remedy in damages) merely

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[8] See also, *e.g.*, 25 U.S.C. 406(a) (proceeds from timber sales "shall be paid to the owner or owners or disposed of for their benefit"); 25 U.S.C. 413 (administrative fees must be "reasonable"); 25 U.S.C. 466 (Secretary must manage Indian forestry units "on the principle of sustained-yield management"); 25 C.F.R. 163.4 (1985) (requiring sustained-yield management); 25 C.F.R. 163.7(c)(2) (1985) (timber "shall be appraised" and sold at not less than appraised value, except as authorized); 25 C.F.R. 163.18 (1985) (administrative fees must be "reasonable").

evaluates whether the particular statutes or regulations that themselves impose specific duties are, *in addition*, money-mandating provisions that are actionable under the Indian Tucker Act.

2. a. The Federal Circuit flipped the controlling analysis on its head. Relying on common-law trust principles, it concluded that governmental functions concerning tribal coal in respects *other than* coal leasing (which is governed by IMLA) justified imposing *new and additional* duties concerning approval of royalty rates in leases. Pet. App. 31a-32a. Courts have no authority to impose such extra-statutory duties on Executive agencies, and such judicially created duties could not in any event give rise to a claim falling within the Indian Tucker Act's waiver of sovereign immunity because such a claim does not arise under an Act of Congress or agency regulation. In other words, the claim is not grounded in a "specific rights-creating or duty-imposing statutory or regulatory prescription[]" that the government allegedly has "failed faithfully to perform." *Navajo*, 537 U.S. at 506. It therefore fails to state a claim cognizable under the Indian Tucker Act.

b. Beyond that, the Federal Circuit's concept of federal "control" sufficient to impose governmental duties concerning the approval of royalty rates negotiated by the Tribe bears no relationship to the actual, managerial control exercised by the government over various matters affecting tribal assets under the specific statutory and regulatory duties addressed in *Mitchell II*. Those statutes and regulations required that the government directly make specific decisions regarding the sale, management, and harvesting of tribal timber resources for the sole benefit of the Indian owners with "[v]irtually every stage of the process * * * under federal con-

trol." *Mitchell II*, 463 U.S. at 222; see *id.* at 220-223 & nn.23-28. In *Apache*, the government *itself* exclusively occupied and exercised plenary control over land and improvements that were subject to an express statutory trust, and it used that property for its *own* purposes. See *Apache*, 537 U.S. at 469; see *id.* at 480-481 (Ginsburg, J, concurring) (1960 Act authorized government's "direct use" and "plenary control"). As this Court explained in *Navajo*, there are no remotely similar provisions vesting the government with actual managerial control over the coal leasing decisions at issue in this case. To the contrary, the thrust of the most relevant statute, IMLA, is to confer control on the Tribes. *Navajo*, 537 U.S. at 508.

The Federal Circuit nevertheless held that the government exercised "comprehensive control" over coal on the Tribe's land because the government played a role under statutes addressed to three discrete coal-related subjects: the government conducted surveys and studies of coal resources on Navajo land under a program that was authorized by the Rehabilitation Act in 1950 and ended by 1964 (see pp. 44-45, *infra*); acted as an environmental *regulator* of third-party operators of surface mines on tribal land pursuant to SMCRA and its implementing regulations; and managed mineral lease royalty payments on behalf of the Tribe. Pet. App. 31a; see *id.* at 27a-31a. Those activities, however, plainly cannot be understood as conferring managerial control over the leasing and royalty-rate decisions at issue in this case. Those decisions were instead governed by IMLA, which, as this Court held in *Navajo*, did not impose any specific duties on the Secretary with respect to the actions challenged in this case.

The Federal Circuit's conclusion that the asserted general governmental "control" of tribal coal supports a "breach of trust claim" even though the government did *not* exercise "specific control of coal leasing" is equally untenable. Pet. App. 31a. The court's reasoning that governmental "control over the greater (e.g., coal resources)" itself implies "control over the lesser (e.g., the leasing of such coal)," *id.* at 32a, not only runs afoul of the normal principle that the specific controls the general, *Morales* v. *TWA*, 504 U.S. 374, 384 (1992), it also wrongly infers *implicit* congressional direction on an issue that Congress addressed *explicitly* in IMLA. Needless to say, the Federal Circuit's analysis cannot be squared with this Court's conclusion *in this case* that the more specific and explicit IMLA, which directly governs Lease 8580, "aims to enhance tribal self-determination by giving Tribes, *not the Government*, the lead role in negotiating mining leases" in a manner "directly at odds with Secretarial control over leasing." *Navajo*, 537 U.S. at 508 (emphasis added) (citation omitted). As the Court has already recognized, "imposing fiduciary duties on the Government here" would contravene one of IMLA's "principal purposes." *Ibid.*

3. The Federal Circuit's decision ultimately charts a particularly pernicious course for plaintiffs to follow. The Tribe, in effect, has challenged the procedures used by the Secretary during Peabody's administrative appeal and in his approval of amendments to Lease 8580 that the Tribe itself negotiated and agreed to. Ordinarily, a plaintiff challenging agency decision-making of that sort must bring suit under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, where it is well settled that the "formulation of [agency] procedures" is "left within the discretion of the agencies to which Congress

ha[s] confided the responsibility for substantive judgments." *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 524-525, 546 (1978) ("[R]eviewing courts are generally not free to impose [procedural requirements] if the agencies have not chosen to grant them."); see *Pension Benefit Guar. Corp.* v. *LTV Corp.*, 496 U.S. 633, 654-655 (1990); *FCC* v. *Schreiber*, 381 U.S. 279, 290-291 (1965) (The "limited judicial responsibility" of the reviewing court is "to insur[e] consistency with governing statutes and the demands of the Constitution.").

By permitting federal courts to impose judicially devised procedures and standards borrowed from common law—in a suit for damages well after the relevant agency action is complete—the Federal Circuit has not only undermined well-established administrative law, it has introduced grave uncertainty into the Interior Department's day-to-day activities carried out by thousands of Departmental employees nationwide. Its decision improperly superimposes on the substantive and procedural framework established under applicable statutes and regulations a broad and amorphous set of trust principles whose precise content cannot be known in any particular context in advance. And those duties announced by a court *after* the agency's challenged action trigger the payment of potentially enormous sums from the federal fisc.

The Federal Circuit's free-wheeling approach based on notions of generalized "control" exercised by the government, moreover, would appear to have few practical constraints. It presumably would impose a broad set of duties drawn from a court's own sense of the common law whenever the government has a general "trust" relationship with a tribe and (a) has discrete statutory

responsibilities with respect to tribal resources or (b) acts in a regulatory capacity to oversee third-party activities on Indian lands under environmental or other statutes. That result is inconsistent with common sense, the separation of powers under our constitutional structure of government, and long-established limitations on judicial fashioning of federal common law, especially where Congress and the Executive have adopted governing standards. *Black & Decker Disability Plan* v. *Nord*, 538 U.S. 822, 831-832 (2003); *City of Milwaukee* v. *Illinois*, 451 U.S. 304 (1981). And, as discussed, it is also foreclosed by both the analytical approach to Indian Tucker Act claims articulated by this Court in this very case and the limited waiver of sovereign immunity in that Act.

C. Neither The Rehabilitation Act Nor SMCRA Furnishes A Valid Basis For The Tribe's Indian Tucker Act Claim

The Federal Circuit's alternative holding that the United States is liable for up to $600 million for violations of three statutory or regulatory provisions of the Rehabilitation Act and SMCRA (Pet. App. 38a-42a) is equally untenable. Neither statute applies to the Secretary's actions in this case or imposes money-mandating obligations cognizable under the Indian Tucker Act.

1. The Navajo-Hopi Rehabilitation Act of 1950

The Rehabilitation Act did not impose any obligation with respect to the Secretary's decisions regarding Lease 8580. The court of appeals' contrary decision was based on Section 638 of that Act, which, as is relevant here, provides that the Navajo Tribal Council and affected Indian communities "shall be kept informed and afforded opportunity to consider from their inception plans pertaining to the program authorized by [the

Act]." 25 U.S.C. 638. That procedural planning provision by its own terms applied only to the "program authorized" by the Rehabilitation Act, which ended decades before the actions challenged in this case. That program, moreover, did not govern the leasing of Navajo lands, let alone the leasing of such lands for mineral mining.

a. The Rehabilitation Act authorized the Secretary in 1950 to undertake, "within the limits of the funds * * * appropriated pursuant to [the Act]," a "program of basic improvements for the conservation and development of the resources of the Navajo and Hopi Indians [and] the more productive employment of their manpower." 25 U.S.C. 631. That program included projects for education, road, soil and water conservation, irrigation, telecommunications, and business development, and the Act expressly specified the amount of federal funding "authorized to be appropriated" for each such element of the program. *Ibid.* Among other things, the Act authorized the Secretary to use $500,000 in appropriated funds to conduct "[s]urveys and studies of timber, coal, mineral, and other physical and human resources." 25 U.S.C. 631(3).

Congress, however, directed that the "foregoing program" shall be conducted "in a manner which will provide for completion of the program, so far as practicable, within ten years from April 19, 1950." 25 U.S.C. 632; see H.R. Rep. No. 2455, 85th Cong., 2d Sess. 4, 7 (1958) (discussing program's status). After Congress added new funding for essential road-building in 1958, *id.* at 1, 4 (discussing amendment to 25 U.S.C. 631(7)), the associated road construction ended around 1964, and the Secretary completed the program authorized by the Act at that time. S. Rep. No. 11, 93d Cong., 1st Sess. 1 (1973).

Congress accordingly abolished the congressional committee that had exercised oversight of the Rehabilitation Act's program because "there [was] no further need" for the committee "now that the program is completed." *Ibid.*

The Rehabilitation Act's requirement that the Navajo Tribal Council and the affected Indian communities "be kept informed and afforded opportunity to consider from their inception plans pertaining to the program authorized by [the Act]," 25 U.S.C. 638, thus ceased to have any effect around 1964, decades before the Secretary's actions in this case. Congress expressly required that the "program" authorized by the Act be conducted "within the limits of the funds * * * appropriated pursuant to [the Act]," 25 U.S.C. 631, and when those funds were exhausted in the 1960s, both the program—and the Secretary's obligations vis-a-vis that program—ceased to exist.

b. Even if the program had been ongoing in 1985, the Rehabilitation Act merely required that the Tribe and affected Indian communities be kept informed of plans pertaining to the "program *authorized* by [the Act]," 25 U.S.C. 638 (emphasis added), which did not include coal leasing. The Act specified the appropriation limits for each of the program's components. See 25 U.S.C. 631. Because funding was "authorized to be appropriated" for "[s]urveys and studies" of coal resources, 25 U.S.C. 631(3), plans concerning such surveys and studies may have triggered an obligation to keep the Tribe and affected Indian communities informed of such plans. The adjustment of coal lease terms, however, plainly does not qualify as a survey or study of coal resources.

Moreover, while future coal mining may have been one of the objectives of studying Tribal coal resources,

nothing suggests that the actual terms or negotiation of coal *leases*, or the procedures for adjustments to such leases, were in any way governed by the Rehabilitation Act or the program authorized by that Act. Indeed, this Court explained that the lease in this case, Lease 8580, was "covered by the IMLA," *Navajo*, 537 U.S. at 495, and the Tribe itself conceded that "Lease 8580 and the lease amendments are governed *only* by the IMLA." J.A. 564 (emphasis added); see J.A. 524-525 (Tribe's proposed findings of fact).[9]

c. The Tribe's newly found position in this Court that Lease 8580 "was drafted and approved by the Department of the Interior under" Section 635 of the Rehabilitation Act, 25 U.S.C. 635, see Br. in Opp. 30; see also *id.* at 27, is demonstrably incorrect. Lease 8580 itself demonstrates that it was issued in 1964 under IMLA, and could not have been issued under the Rehabilitation Act, which addresses leasing for purposes other than mining.

Before Section 635 was enacted in 1950, tribes were authorized to lease trust land for non-mining business purposes for terms of five years or less. 25 C.F.R. 171.2, 171.9 (1949). Because that restriction—which did not apply to IMLA mineral leases, 25 U.S.C. 396a (1946)—discouraged investments of "outside capital," Section 635 was adopted to increase the maximum lease terms. *Navajo and Hopi Rehabilitation: Hearings on H.R. 3476 Before a Subcomm. on Indian Affairs of the House*

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[9] Even if the Secretary had violated a procedural notice obligation in handling Peabody's administrative appeal, that violation would not entitle the Tribe to damages under the Indian Tucker Act. Procedural duties are in the nature of due process protections, and even constitutional procedural due process violations do not give rise to a damages claim under the Act. See, *e.g.*, *Testan*, 424 U.S. at 403; *United States* v. *Hopkins*, 427 U.S. 123, 130 (1976) (per curiam).

Comm. on Public Lands, 81st Cong., 1st Sess. 72, 183 (1949). Section 635 thus authorized "long-term leases of lands needed for such purposes as public airports, churches, mission schools, recreational resorts, service stations, factories, warehouses, stockyards, and the like," H.R. Rep. No. 1474, 81st Cong., 2d Sess. 5 (1950), including the "development or utilization of natural resources in connection with [such] operations." 25 U.S.C. 635(a); see 21 Fed. Reg. 2562-2563 (1956) (revising 25 C.F.R. 171.6 to reflect enactment of "25 U.S.C. * * * 635"). Leases for mining operations, both before and after the Rehabilitation Act, have been governed by a different statute (IMLA) and regulatory provisions. See note 10, *infra*. Indeed, the regulations issued by the Secretary under Section 635 confirm that they have no application to "[m]ineral leases," 25 C.F.R. 162.103(a)(1), and that interpretation is entitled to deference under *Chevron*.

Lease 8580 similarly demonstrates that it was issued under IMLA, not Section 635. Lease 8580 expressly requires compliance with *IMLA*'s implementing regulations (then 25 C.F.R. Pt. 171 (1964)) not those for Section 635 (then 25 C.F.R. Pt. 131 (1964)). J.A. 197.[10] In addition, IMLA provides that tribal mineral leases may be "for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities," 25 U.S.C. 396a, and Lease 8580 tracks that language nearly verbatim. J.A. 189 (establishing "term of ten (10)

[10] Interior's IMLA regulations were codified in Part 186 from 1938-1957, moved to Part 171 from 1957-1982, and now are in Part 211. Regulations governing leasing under Section 635 for non-mining purposes were codified at Part 171 until 1957, moved to Part 131 from 1957-1982, and are now codified in Part 162. See 22 Fed. Reg. 10,588 (1957); 47 Fed. Reg. 13,327 (1982).

years from the date [of Lease 8580] and for so long thereafter as the substances produced are being mined by the Lessee * * * in paying quantities"). That lease accordingly extends indefinitely as long as paying mining operations continue and "until the resources are depleted." *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 135, 145 n.10 (1982). In contrast, "[a]ll leases" under Section 635 "shall be for a term of not to exceed twenty-five years," with an optional "renewal for an additional term of not to exceed twenty-five years." 25 U.S.C. 635(a). Given the latter limitation, Section 635 could not have authorized the open-ended term of Lease 8580. In short, the Rehabilitation Act is simply irrelevant to the Tribe's claim in this case.

2. The Surface Mining Control and Reclamation Act of 1977

The Federal Circuit's reliance on SMCRA and an associated regulation is equally unavailing. Pet. App. 38a-42a. Neither 30 C.F.R. 750.6(d)(1) nor Section 1300(e) of SMCRA has any relevance to the Secretary's conduct in this case.

a. First, the court of appeals' conclusion (Pet. App. 38a-39a) that the Secretary violated a regulatory duty to "provid[e] representation for Indian mineral owners * * * in matters relating to surface coal mining and reclamation operations," 30 C.F.R. 750.6(d)(1), is contradicted by the regulation itself. By its own terms, that provision concerns the "regulation of surface coal mining and reclamation *operations*" by the Department of Interior, 30 C.F.R. 750.1 (emphasis added), and describes the role of the BIA *within* the Interior Department, not the Secretary as head of the Department, in representing tribal interests in consultations with the Office of

Surface Mining concerning OSM's regulatory actions. 30 C.F.R. 750.6(a)(1)-(2) and (d)(1)-(2). The regulation thus merely "describes a procedural arrangement by which the BIA [and] OSM * * * coordinate and execute their respective functions and responsibilities" under SMCRA; it neither affects "the role of tribes as lessors" nor the "statutory or regulatory prerogatives of the Secretary with respect to Indian lands." 49 Fed. Reg. 38,467 (1984).

b. Second, the court's conclusion that SMCRA Section 1300(e) required the Secretary to adjust the royalty rate as requested by the Tribe (Pet. App. 39a-40a) is deeply flawed on multiple levels. First, Lease 8580 was issued in 1964 and Section 1300(e), by its own terms, applies only to leases issued after 1977. Second, the text and structure of Section 1300 demonstrate that Subsection (e) is limited to lease provisions regarding the regulation of mining operations under SMCRA. Third, even if the statute were ambiguous on that point, the Secretary's regulatory interpretation of Section 1300(e) as embodying that limitation is entitled to deference. Finally, common sense itself confirms that the court of appeals' expansive reading of Section 1300(e) cannot be correct.

Subsections (c) and (d) of the Act's Indian lands section (30 U.S.C. 1300) provide that all surface coal mining operations on Indian lands shall comply with "requirements" at least as stringent as those imposed by a specific list of SMCRA's statutory provisions concerning performance standards and requirements for "surface coal mining operations." 30 U.S.C. 1300(c) and (d). Subsections (c) and (d) further specify that the Secretary shall incorporate the requirements of those provisions into "all existing and new leases issued for coal on In-

dian lands." *Ibid.* Subsection (e), in turn, states that, "[w]ith respect to leases issued after August 3, 1977," the Secretary "shall include and enforce terms and conditions in addition to those required by subsections (c) and (d) * * * as may be requested by the Indian tribe." 30 U.S.C. 1300(e). By its very terms, Section 1300(e) does not apply to Lease 8580 or the royalty rate provisions at issue in this case.

Lease 8580, as noted, was issued in 1964, J.A. 188, 210, and Section 1300(e) applies only to leases "issued after August 3, 1977," the date on which Congress enacted SMCRA. See 30 U.S.C. 1300(e). The Federal Circuit's conclusion that the Tribe's negotiated amendment to the lease (J.A. 276-336) was "in substance a new lease" and only "an amendment in form," Pet. App. 42a, is inconsistent with the Secretary's regulation construing Section 1300(e). That regulation permits the Secretary to include and enforce lease terms requested by the Tribe whenever a lease is "renew[ed], renegotiat[ed], or readjust[ed]," but only if the lease itself was "issued by the Secretary after August 3, 1977." 25 C.F.R. 200.11(b). Whether or not a lease is renegotiated to substantially alter its terms, such renegotiation does not alter the date on which the lease was first issued. And, to the extent that Section 1300(e)'s temporal restriction is ambiguous in that regard, the Secretary's reasonable statutory interpretation is entitled to *Chevron* deference.

More importantly, the text and structure of Section 1300 and SMCRA as a whole make manifest that Section 1300(e) applies only to lease terms that relate to the regulation of on-the-ground mining *operations* under SMCRA, not the adjustment of royalty rates at issue here. Congress enacted SMCRA to "establish a nation-

wide program to protect society and the environment from the adverse effects of surface coal mining operations," 30 U.S.C. 1202(a), and therefore imposed a series of permitting and other requirements that set performance standards for on-going surface coal mining and require plans for post-mining reclamation. See, *e.g.*, 30 U.S.C. 1257-1260, 1265. Those provisions, however, do not apply by their own terms to mining on Indian lands. 30 U.S.C. 1273(a), 1291(9). Instead, Congress directed the Secretary to study the question of the regulation of surface mining on Indian lands. See 30 U.S.C. 1300(a) and (b). For the time being, however, Congress extended many of the Act's central requirements to Indian lands and specified that the Secretary shall incorporate specifically enumerated statutory requirements in existing and new leases issued for coal on Indian lands. See 30 U.S.C. 1300(c) and (d).

By requiring in Section 1300(e) that the Secretary include and enforce "terms and conditions" requested by a lessor tribe "in addition to those required by subsections (c) and (d)," Congress limited the requested terms and conditions to those related to SMCRA's other provisions. "[U]nder the established interpretative canons of *noscitur a sociis* and *ejusdem generis*, '[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.'" *Washington State Dep't of Soc. & Health Servs.* v. *Guardianship Estate of Keffeler*, 537 U.S. 371, 384-385 (2003) (citation omitted). Here, the "terms and conditions" subject to Section 1300(e) similarly reflect facially broad words that are logically understood to encompass only those "terms and conditions" similar to those in Subsections (c) and (d) to which

they are an "addition." Indeed, Congress specified in Subsections (c) and (d) that coal lessees operating on tribal land must comply with requirements "at least as stringent" as the specifically enumerated SMCRA requirements that Congress mandated for surface mining operations generally, 30 U.S.C. 1300(c) and (d), and, accordingly, authorized tribes in Subsection (e) to request the Secretary to include *more stringent* SMCRA-related requirements "in addition" to the minimum requirements imposed by Congress. 30 U.S.C. 1300(e).

Moreover, to the extent that the scope of Section 1300(e) is ambiguous, the Secretary has concluded that a "reasonable interpretation" of that provision permits "only those terms and conditions related solely to SMCRA" to be added to leases. 53 Fed. Reg. 3994 (1988). The Secretary has accordingly made clear that Section 1300(e) does not "encompass terms and conditions unrelated to SMCRA," 54 Fed. Reg. 22,187 (1989), by adopting a regulation that specifies that the "terms and conditions" that a tribe may request under Section 1300(e) are those "related to [SMCRA]" itself, 25 C.F.R. 200.11(b). That interpretation is at least a reasonable (if not the only permissible) construction of the statute and, accordingly, is entitled to *Chevron* deference.

Not only has the Tribe conceded that "Lease 8580 and the lease amendments are governed only by the IMLA," J.A. 564, common sense compels the conclusion that Section 1300(e) does not require the Secretary to include any lease terms and conditions unilaterally requested by the Tribe in its existing lease with Peabody. Had Congress intended to grant Indian tribes and the Secretary such unrestrained authority to alter any and all terms of tribal coal leasing contracts, it presumably would have made that intent manifest. Cf. *Whitman* v.

American Trucking Ass'ns, 531 U.S. 457, 468 (2001) (Congress "does not, one might say, hide elephants in mouseholes"). Indeed, if the Secretary were required to accept the Tribe's requested royalty rate under Section 1300(e), the entire process for obtaining and appealing an adjustment of the royalty rate in this case under IMLA would have been a meaningless exercise, since the outcome would have been compelled by the Tribe's request. The Federal Circuit therefore erred in its remarkably expansive reading of Section 1300(e), which lends no support to the Tribe's Indian Tucker Act claim in this case.

* * * * *

In short, the statutory and regulatory provisions that the Federal Circuit found to be violated by the Secretary have no application to lease approvals or royalty rates and furnish no conceivable basis for an Indian Tucker Act claim. IMLA is the specific statute that addresses the matters at the heart of this lawsuit, which is why it was the focus of this Court's earlier decision. The ease with which the Federal Circuit nonetheless held that statutory provisions governing *other* subjects impose duties specifically with respect to lease royalties and procedures for considering lease amendments—imposing liability for up to $600 million—underscores how far the Federal Circuit has strayed from this Court's decision in this very case and the long-settled principles on which it was based. Indeed, this case amply illustrates the serious adverse consequences of the court of appeals' profound errors in disregarding the need to train on "a violation of a specific rights-creating or duty-imposing statute or regulation" governing royalty rates, Pet. App. 36a. See *Navajo*, 537 U.S. at 506.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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NOVEMBER 2008